

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Streamlining Deployment
of Small Cell Infrastructure
by Improving Wireless Siting Policies

WT Docket No. 16-421

COMMENTS BY THE CITY OF NEW ALBANY, OHIO

Joseph Stefanov
City Manager
City of New Albany
99 West Main Street
P.O. Box 188
New Albany, OH 43054-0188
(614) 939-2232

March 6, 2017

TABLE OF CONTENTS

I. THE PETITION FOR DECLARATORY RULING FROM MOBILITIE, LLC OVERLY GENERALIZES FEES CHARGED BY COMMUNITIES FOR THE DEPLOYMENT OF INFRASTRUCTURE ON PUBLIC RIGHTS-OF-WAY	5
II. THE DELAYS IN LOCAL PERMITTING AND ZONING PROCESSES FOR SMALL CELL BUILDS ON PUBLIC RIGHTS-OF-WAY ARE ATTRIBUTABLE TO THE SIZE OF THE TOWERS IN MOBILITIES' APPLICATIONS.	8
III. MOBILITIE MISREPRESENTS THE STATE OF WIRELESS BROADBAND AND OVERLOOKS SEVERAL OPTIONS TO SMALL CELL DEPLOYMENT THAT DO NOT REQUIRE USE OF LOCAL RIGHTS-OF-WAY	9
IV. CONCLUSION.....	10

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Streamlining Deployment
of Small Cell Infrastructure
by Improving Wireless Siting Policies

WT Docket No. 16-421

COMMENTS BY THE CITY OF NEW ALBANY, OHIO

On July 14, 2016, the Federal Communications Commission (“FCC” or “Commission”) unanimously voted to open high-band spectrum for 5th generation (“5G”) wireless expansion.¹ This action is projected to greatly impact connected devices and the Internet of Things (“IoT”). The City of New Albany (the “City” or “New Albany”) recognizes that widespread 5G and IoT deployments are not only imminent, but essential in order for communities to experience the full benefits of being a “smart city,” and municipalities that plan accordingly can be at the forefront of this revolution.

While this new technology enables wireless carriers to provide improved voice and data services, it also requires the proliferation of smaller, more numerous towers and antennas. As the FCC recognized in its Public Notice on Streamlining Deployment of Small Cell Infrastructure,

[t]his creates a dilemma . . . localities play an important role in preserving local interests such as aesthetics and safety. At the same time, the Commission has a

¹ FED. COMMUNICATIONS COMM’N (2016), *available at* <https://www.fcc.gov/news-events/events/2016/07/july-2016-open-commission-meeting>.

statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless service to consumers throughout the United States.²

Municipalities are naturally protective of their right-of-way (“ROW”) and the aesthetics of their communities - aesthetics are an integral part of a city’s planning and development process and localities spend a significant amount of money each year to maintain them. As a result, communities may caution the deployment of certain infrastructure in the local right-of-way, despite the need for modern communications for end-user residents and businesses.

To govern this balance, the City of New Albany enacted Chapter 1179 of its Code of Ordinances, “Wireless Telecommunications Facilities,” in 1998.³ The City updated Chapter 1179 in 2014 to address new technologies such as Distributed Antenna System (DAS) and small cell applications. The City also enacted Chapter 907 of its Code of Ordinances in 2014 to create a comprehensive right-of-way management and control ordinance.⁴ Chapter 907 also served to bring New Albany into compliance with Ohio Revised Code § 4939, which governs the use of the municipal public way in Ohio and will be discussed in further detail later in these Comments.

Chapter 1179 of New Albany’s Code of Ordinances “provides for the regulation of the placement, construction and modification of towers and wireless telecommunications facilities in order to protect the health, safety and welfare of the public, while at the same time not unreasonably interfering with the development of the competitive wireless telecommunications marketplace in the City.”⁵ The Chapter institutes reasonable restrictions as to the location, height,

² *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (WTB 2016) (Public Notice).

³ NEW ALBANY, OH., CODE OF ORDINANCES ch. 1179 (2014).

⁴ NEW ALBANY, OH., CODE OF ORDINANCES ch. 907 (2014).

⁵ NEW ALBANY, OH., CODE OF ORDINANCES ch. 1179.01 (2014).

aesthetics, and placement of towers and wireless telecommunications facilities from rights-of-way and residential users, and encourages cell companies to work in partnership with the City of New Albany to identify locations that meet the needs of both the providers and the community.

As detailed in these Comments, the Petition for Declaratory Ruling from Mobilitie, LLC (“Mobilitie”) overly generalizes the fees assessed and approval times instituted by communities across the United States for use of their public rights-of-way. The City of New Albany recently received a proposal from Mobilitie for three new towers in the local right-of-way. Chapter 1179 of the City’s Code prohibits this tower siting and Mobilitie has not yet filed a formal application; however, New Albany is working cooperatively with Mobilitie to identify acceptable locations.

I. THE PETITION FOR DECLARATORY RULING FROM MOBILITIE, LLC OVERLY GENERALIZES FEES CHARGED BY COMMUNITIES FOR THE DEPLOYMENT OF INFRASTRUCTURE ON PUBLIC RIGHTS-OF-WAY.

In its Petition for Declaratory Ruling to the FCC, Mobilitie claims that many localities request “multiple, exorbitant fees that unlawfully discriminate against wireless technology and impair new or improved service” and that many local governments impose fees that “appear to be set to recover what localities believe the ‘market’ rate is for the use of their rights-of-way, rather than to recover ‘fair and reasonable compensation’ for localities’ expenses.”⁶

The City of New Albany continually seeks to align its actions regarding the use of City right-of-way with Ohio Revised Code § 4939, which governs the use of the municipal public way in Ohio. According to section 4939.02:

(A) It is the public policy of [Ohio] to do all of the following:

⁶ Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) [hereinafter *Mobilitie Petition*].

- (1) Promote the public health, safety, and welfare regarding access to and the occupancy or use of public ways, to protect public and private property, and to promote economic development in this state;
 - (2) Promote the availability of a wide range of utility, communication, and other services to residents of this state at reasonable costs, including the rapid implementation of new technologies and innovative services;
 - (3) Ensure that access to and occupancy or use of public ways advances the state policies specified in sections 4927.02 [“Telecommunications – Alternative Regulation”], 4928.02 [“Competitive Retail Electric Service”], and 4929.02 [“Alternate Rate Plan for Natural Gas Companies; Certification of Governmental Aggregators and Retail Natural Gas Suppliers”] of the Revised Code;
 - (4) Recognize the authority of a municipal corporation to manage access to and the occupancy or use of public ways to the extent necessary with regard to matters of local concern, and to receive cost recovery for the occupancy or use of public ways in accordance with law;
 - (5) Ensure in accordance with law the recovery by a public utility of public way fees and related costs;
 - (6) Promote coordination and standardization of municipal management of the occupancy or use of public ways, to enable efficient placement and operation of structures, appurtenances, or facilities necessary for the delivery of public utility or cable services;
 - (7) Encourage agreement among parties regarding public way fees and regarding terms and conditions pertaining to access to and the occupancy or use of public ways, and to facilitate the resolution of disputes regarding public way fees.
- (B) This policy establishes fair terms and conditions for the use of public ways and does not unduly burden persons occupying or using public ways or persons that benefit from the services provided by such occupants or users.⁷

Recently adopted Ohio Senate Bill 331 updated section 4939.02 to further include “[e]xpeditious the installation and operation of micro wireless facilities in order to facilitate the deployment of advanced wireless service throughout the state.”⁸

⁷ OHIO REV. CODE § 4939.02 (2002).

⁸ 2016 Ohio Laws File 148 (Sub. S.B. 331).

Section 4939 defines a "public way fee" as "a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way."⁹ The section restricts cost recovery to actual and direct fees associated with the use of the public right-of-way:

Public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way. The costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation . . . No public way fee shall include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user or pursuant to any reasonable classification of occupants or users.¹⁰

By requiring fees to be based on costs incurred and be demonstrable, Ohio law clearly promotes the "'fair and reasonable compensation' for localities' expenses" that Mobilitie requests in its Petition. The company's assertions regarding "exorbitant fees" are sweeping statements that are not representative of the sensible approaches implemented by many states and cities nationwide, including New Albany.

Mobilitie recognizes in its Petition that "[r]ights of way have always served the public interest by enabling citizens to obtain and use essential services, such as electricity, telephone, gas, water, and transportation."¹¹ Decades of providing these essential services leads to many structures already utilizing local rights-of-way, and the ongoing provision of such services requires detailed review of applications for cell tower and wireless telecommunications facilities in order to ensure that they will not interfere with current right-of-way users.

⁹ OHIO REV. CODE § 4939.01 (2012).

¹⁰ OHIO REV. CODE § 4939.05(C) (2002).

¹¹ *Mobilitie Petition*, *supra* note 6, at 2.

In New Albany, in accordance with state statute,¹² fees for right-of-way use are utilized to ensure sufficient application review in order to protect local safety, health, and welfare. New Albany requires a Certificate of Registration “to construct, own, or maintain any system within the City, or to obtain a renewal of a Certificate of Registration.”¹³ According to Section 907.03 of the Code of Ordinances, “[f]or all Applications the City shall collect an Application Fee. The Application Fee shall be equal to all the actual and direct costs incurred by the City that are associated with receiving, reviewing, processing and granting (or denying) an Application.”¹⁴

II. THE DELAYS IN LOCAL PERMITTING AND ZONING PROCESSES FOR SMALL CELL BUILDS ON PUBLIC RIGHTS-OF-WAY ARE ATTRIBUTABLE TO THE SIZE OF THE TOWERS IN MOBILITIES’ APPLICATIONS.

According to the Public Notice, “some industry participants assert that local permitting and zoning processing for both new tower and small cell builds continue to encounter frequent delays.”¹⁵ The Commission projects that the review process for small cell applications should be faster than the review for macro facilities; yet, the Commission seeks comment on how it should define “small cell.”¹⁶

While the federal definition of small cell is unclear, Mobilitie has approached municipalities with plans to construct towers in the right-of-way to be used for DAS that range

¹² “A municipal corporation may levy different public way fees based upon the amount of public ways occupied or used, the type of utility service provided by a public utility, or any different treatment required by the public health, safety, and welfare.” OHIO REV. CODE § 4939.05(B)(1) (2002).

¹³ NEW ALBANY, OH., CODE OF ORDINANCES ch. 907.03 (2014).

¹⁴ *Id.*

¹⁵ Public Notice, *supra* note 2, at *5.

¹⁶ *Id.* at *8.

from 70 to 120 feet in height.¹⁷ The City of New Albany’s Code explicitly prohibits such tower siting,¹⁸ but permits tower siting in close proximity to local right-of-way through the City’s zoning ordinance. Regardless, towers of such size cannot be considered “small,” especially in light of the fact that they have been proposed for location in the public right-of-way. Stated simply, reviewing Mobilitie’s applications may take longer than other small cell requests because they are different, larger structures.

III. MOBILITIE MISREPRESENTS THE STATE OF WIRELESS BROADBAND AND OVERLOOKS SEVERAL OPTIONS TO SMALL CELL DEPLOYMENT THAT DO NOT REQUIRE USE OF LOCAL RIGHTS-OF-WAY.

Although not requested by the Commission, there are several additional discrepancies in the Mobilitie Petition that the City of New Albany seeks to address in these Comments.

First, Mobilitie states that “many citizens who lack access to robust wireless broadband reside in urban areas, where small cell deployments along rights-of-way offer the optimal, if not the only, solution to making broadband available to meet increasing demand.”¹⁹ The City of New Albany is an urban community, and Mobilitie’s statement is simply not accurate – it is continually citizens who reside in rural areas that lack access to robust wireless access. Connect Ohio is a nonprofit organization in Ohio that, since 2007, has served as the state’s comprehensive broadband repository and provided this data to inform state and local strategies to

¹⁷ “Carriers and other wireless providers regularly approach municipalities with plans to construct a variety of wireless networks. But Mobilitie is approaching municipalities trying to deploy mini cell towers in public rights of way under the “small cell” moniker. That, despite the towers were going to be used for DAS and range from 70 to 120 feet in height, which are definitely not small cells.” Ernest Worthman, *Mini-cell Towers Shouldn’t Be Passed as Small Cells*, ABOVE GROUND LEVEL MEDIA GROUP (Aug. 30, 2016), <http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/>.

¹⁸ “Towers are a prohibited use/ structure in the Right(s) of Way in all zoning districts within the City.” NEW ALBANY, OH., CODE OF ORDINANCES ch. 1179.04 (2014).

¹⁹ *Mobilitie Petition*, *supra* note 6, at 3.

improve and expand broadband throughout the state.²⁰ Connect Ohio collects and maps data to track the progress of high-speed wireline and wireless access in Ohio. According to Connect Ohio, 100% of Ohio’s urban areas have access to mobile wireless at speeds of 10 Mbps upload/ 1 Mbps download, while 92.66% of rural Ohio areas have access to this speed.

Second, Mobilitie asserts that using local rights-of-way “reduces the transaction costs providers incur to negotiate with private landowners for access to individual buildings, which can involve hundreds of different leases across a geographic area.” Although this is accurate, Mobilitie’s Petition overlooks several options to small cell deployment that do not require use of the right-of-way. For example, developers could utilize existing towers or facilities to co-locate their equipment, such as cellular towers, street light poles, tall buildings, or water storage tanks, and/ or consider public parks or open green spaces to place wide or tall towers. If small antenna systems are used in the right-of-way, developers should seek to match the aesthetics of existing infrastructure. For example, the City of New Albany is willing to work with providers to develop a “signature” pole to complement existing light poles.

IV. CONCLUSION

The City of New Albany cautions the Federal Communications Commission from placing too much stock in Mobilitie’s assertions in its Petition for Declaratory Ruling. As expressed in these Comments, Mobilitie overly generalizes the fees charged by communities and application approval times for the deployment of infrastructure on public rights-of-way. Very simply, Mobilitie’s Petition makes blanket assertions that are not characteristic of all communities, including the City of New Albany.

²⁰ CONNECT OHIO, <http://www.connectohio.org> (last visited Feb. 7, 2017).

Respectfully submitted,

Joseph Stefanov
City Manager
City of New Albany
99 West Main Street
P.O. Box 188
New Albany, OH 43054-0188
(614) 939-2232

By and through its special legal counsel

A handwritten signature in black ink, appearing to read "Christopher Miller", with a long horizontal flourish extending to the right.

Christopher Miller
Partner
Ice Miller, LLP
50 West Street
Suite 700
Columbus, OH 43215

March 6, 2017